

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
Of 1996)
)
Joint Petition of BellSouth, SBC, and Verizon)
For Elimination of Mandatory Unbundling of)
High-Capacity Loops and Dedicated Transport)

CC Docket No. 96-98 /

COMMENTS OF THE
COALITION OF COMPETITIVE FIBER PROVIDERS

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SUMMARY

Contrary to the contentions of the BOC Petition, current and future fiber-based telecommunications offerings of the Coalition members, or of competitive fiber providers generally, do not justify dismantling ILECs' obligations to provide unbundled high capacity loops and transport. In particular, the Coalition's offerings are not able to sufficiently substitute for unbundled ILEC facilities as long as competitive fiber providers are denied reasonable and nondiscriminatory access to "any" ILEC duct and conduit leading to, and in, ILEC central offices. As demonstrated in the Coalition's Petition for Declaratory Ruling, ILECs are required to provide that access pursuant to Sections 251(b)(4) and 224 of the Communications Act. It is particularly objectionable for the Petition to point to the Coalition as support for ILECs terminating key responsibilities at the same time that ILECs are thwarting competitive fiber providers' access to central offices, which would be the first step in facilitating alternative fiber providers' ability to offer service with the same ubiquity as ILECs.

Moreover, the competitive services that Coalition members and other CFPs offer, or will offer in the foreseeable future, do not individually or collectively provide the same ubiquity as ILEC high capacity loops and transport, even in major markets. While Coalition members and other fiber providers are investing substantial sums in new network facilities, it is frequently the case the CLECs have no alternative to ILEC high capacity loops and transport in order to provide service, as CLECs will demonstrate in this proceeding. In addition, ILEC fiber investment dwarfs that of competitive fiber providers. SBC alone is investing nearly triple what all fiber providers are investing. Competitive fiber providers will not realistically be able to offer the same ubiquity of high capacity services as ILECs for the foreseeable future. Further, most CFPs are new companies with limited network build-outs at this time.

In any event, the showing presented with the Petition is so flawed as to provide absolutely no basis for a conclusion that the CLECs would not be impaired without unbundled access to ILEC high capacity loops and transport. For example, the Petition double and even triple counts CLEC fiber, and, apparently, also includes long haul fiber. Therefore, the Petition seriously overestimates the extent and availability of competitive local fiber facilities.

The Petition is also premature in that the FCC in the *UNE Remand Order* established a three-year review period for reexamination of the national list of UNEs which will not commence until February 2002. Furthermore, the Petition is premature because it presents essentially trivial changes in facts that the FCC already considered and rejected in the *UNE Remand Order*.

Accordingly, the Commission should deny the petition.

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**COMMENTS OF THE
COALITION OF COMPETITIVE FIBER PROVIDERS**

The Coalition of Competitive Fiber Providers (the “Coalition”) submits these comments in response to the Joint Petition (“Petition”) filed by BellSouth, SBC, and Verizon requesting that the Commission determine that incumbent local exchange carriers (“ILECs”) are not required to make high capacity loops and dedicated transport available to requesting telecommunications carriers as unbundled network elements (“UNEs”).¹ For the reasons stated below, the Commission should deny the Petition.

I. ILECS DENY CFPs REASONABLE AND NONDISCRIMINATORY ACCESS TO ILEC CENTRAL OFFICES

In its petition for declaratory ruling, the Coalition explained that, pursuant to Sections 251(b)(4) and 224(f)(1) of the Act, ILECs must provide telecommunications carriers reasonable

¹ See Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon, CC Docket No. 96-98, DA 01-911 (April 10, 2001), extension of time granted, Common Carrier Bureau Grants Motion for Extension of Time For Filing Comments and Reply Comments on BOC Joint Petition Regarding Unbundled Network Elements, CC Docket No. 96-98, DA (01-1041) (April 23, 2001) (setting June 11, 2001 filing date); see also, Common Carrier Bureau Requests Comment on Crandall Declaration, CC Docket No. 96-98, DA 01-1211 (May 14, 2001) (seeking comment on additional issue).

and nondiscriminatory access to “any” ILEC duct and conduit, including that leading to, and in, ILEC central offices.² The Coalition explained that competitive fiber providers (“CFPs”) need to be able to extend fiber into ILEC central offices and to install feeder distribution frames in order to be able efficiently to provide competitive transport services to CLECs collocated there. However, as also explained in this petition, ILECs unlawfully deny CFPs this access to ILEC central office duct and conduit. It is particularly disingenuous of the BOC Petition to suggest that Coalition members provide an alternative to ILEC facilities at the same time that SBC, Verizon, and BellSouth are thwarting Coalition members’ ability to provide their proposed services and facilities.

In fact, as long as CFPs are unable to readily provide competitive transport services to CLECs by extending wiring into ILEC central offices and installing distribution frames there, CFPs will be unable to offer an alternative to ILEC UNE transport services that realistically substitutes in significant respects for ILEC high capacity loops and transport. CLECs typically require collocation in ILEC central offices in order to interconnect with the ILEC and/or access UNEs of the ILEC. If CFPs are limited to connecting with CLECs at other sites, including the “collocation hotels” cited in the “Fact Report” attached to the BOC Petition, CLECs must obtain additional links between their collocation sites in ILEC central offices and these other sites. Almost by definition, therefore, the alternative of obtaining transport from CFPs will be less attractive to some extent than obtaining it from the ILEC. If CLECs must first backhaul traffic to some other point, such as a collocation hotel, in order to obtain transport from a CFP, CFPs services obviously are disadvantaged in relation to ILEC transport services. Therefore, there is

² Pleading Cycle Established for Comments on Petition of Coalition of Competitive Fiber Providers for Declaratory Ruling of Sections 251(b)(4) and 224(f)(1), Public Notice, CC Docket No. 01-77, DA 01-728 (March 22, 2001).

no basis for the Commission to conclude that CFP services duplicate ILEC services as long as ILECs are thwarting CFPs' ability to provide such services efficiently to them.

II. PLANNED NETWORKS DO NOT ELIMINATE A PRESENT IMPAIRMENT

The "Fact Report" states that in the last five years there has been a dramatic increase in fiber supplied by alternative wholesale suppliers.³ In support, the "Fact Report" presents Table 6 "Wholesale Local Fiber Providers"⁴ which includes a list of companies and for each company cities with "Operational and Planned Networks." The Petition also points out that Coalition members "provide, or will provide, advanced fiber-based transport services, including interoffice transport, and/or dark fiber to end users and other telecommunications carriers."⁵ The BOC Petition states that AFS is in the process of installing dark fiber rings in 131 cities in 41 states across the country,⁶ and that AFS plans to install more than 1.4 million miles of fiber optic strands in mid-sized second and third-tier U.S. cities in the next five to seven years.⁷ The BOC Petition also notes that Fiber Technologies plans to build over 40 local metro networks which will total over 6400 route miles with over 306,000 fiber miles,⁸ and that El Paso plans to spend \$2 billion over the next four years on a nationwide fiber network and plans to overbuild its metropolitan areas to provide better connectivity.⁹

However, the "Fact Report" makes no attempt in its Table 6, or with respect to Coalition members, to differentiate between those wholesale provider networks that are operational and those that are planned. By itself, this omission undermines the Petition's assertion that

³ Fact Report p. 14.

⁴ Id. p. 15.

⁵ Id. p. 14.

⁶ Id. p. 18.

⁷ Id.

⁸ Id.

⁹ Id. p. 21, citing L.LaBarba, Someone is Still Spending, Telephony (February 26, 2001).

wholesale suppliers obviate any need for continued unbundling of ILEC high capacity loops and transport. And, this bold unsupported assertion is certainly insufficient for a finding that CLECs would not be impaired if deprived of unbundled access to ILEC high capacity loops and transport. Obviously, future competitive alternatives cannot eliminate the impairment that CLECs would suffer, now, by dismantling unbundling obligations before those new alternatives are constructed.

In this connection, most Coalition members are very new companies that are for the most part still in the early stages of implementing their business plans and have just begun the process of building out the networks that the BOC Petition petition assumes are now available to provide competitive services to CLECs.¹⁰ While Coalition members are rapidly constructing facilities, they are also very much in the process of dealing with franchising, rights-of-way, and construction details, not to mention the previously discussed lack of access to ILEC central offices. As noted in the BOC Petition, Coalition members represent an investment of \$1 billion (in fact considerably more than that), but this amount remains in the process of being invested, and does not reflect constructed facilities.¹¹ Other CFPs are also, for the most part predominantly in the process of building networks. It also worth noting that the competitive industry is currently experiencing a heightened degree of marketplace difficulties especially restricted access to capital markets.¹² To the extent competitive fiber providers business plans require additional access to the capital markets, the current environment will slow completion of their networks.

¹⁰ Global Metro Networks recently scaled back its network construction plans. <http://www.washingtonpost.com/wp-dyn/articles/A21368-2001Jun4.html>

¹¹ Fact Report, p. 1, quoting the Coalition's petition, p. 2.

The BOC Petition essentially provides unsupported, sweeping assertions about the ability of Coalition members to readily provide competitive transport services. In fact, the Coalition is confident that the record gathered in response to the BOC Petition will show that CLECs continue to be dependent on ILECs in this regard, and would be substantially impaired without unbundled access to high capacity loops and transport. Although Coalition members are striving to realize the vision of broadband competitive alternatives to ILEC high capacity loops and transport, the Coalition hereby affirms that their networks do not now provide a ubiquitous substitute for these ILEC facilities. Therefore, with respect to Coalition members, there is no basis on the current record for the Commission to conclude that their services provide at this time a realistic substitute for ILEC unbundled high capacity loops and transport.

III. EVEN WHEN FULLY CONSTRUCTED, COMPETITIVE FIBER NETWORKS WILL NOT PROVIDE A UBIQUITOUS SUBSTITUTE FOR ILEC HIGH CAPACITY LOOPS AND TRANSPORT

Even when fully constructed, competitive fiber networks will not enable CLECs to completely bypass ILEC high capacity loops and transport. This is true even with respect to the highest density markets. Based on the Coalition members' knowledge of their respective network development plans, and of fiber providers in general, it is their estimation that even in the highest density markets CLECs will continue to require high capacity loops and transport to provide service to and reach many customers.

This is demonstrated by the huge disparity in fiber investment between ILECs and the competitive industry. SBC alone is spending \$6 billion to upgrade the feeder portion of loops to

¹² Peter S. Goodman, Bells Stand to Benefit from New FCC Chairman's Neutrality, Economists Say, The Washington Post (May 2, 2001). <http://www.washtech.com/news/telecom/9487-1.html> ("Goodman Article").

fiber for 80% of its customers.¹³ Obviously, this dwarfs the total planned nationwide investment of Coalition members. These numbers, by themselves, demonstrate that competitive fiber providers cannot be expected to offer the same ubiquity as ILECs of fiber access to customers.

Accordingly, the Commission may not reasonably conclude that Coalition members, or CFPs generally, currently or will soon provide services sufficient to obviate a need for access by CLECs to ILEC high capacity loops and transport.

IV. THE “FACT REPORT” DOES NOT PROVIDE RELIABLE ESTIMATES OF THE EXTENT OF COMPETITIVE ALTERNATIVES

The BOC Petition and its associated “Fact Report” purport to provide documentation of the extent of fiber deployment by competitive fiber providers. According to the “Fact Report,” CLECs have deployed over 200,000 route miles of local fiber, “an increase of more than 36 percent” from the 160,000 route miles in-place “[a]t the time of the UNE Remand proceedings.”¹⁴ Apart from the fact that there is no particular reason why 200,000 route miles should be treated as a magic number for eliminating ILEC high capacity loop and transport unbundling obligations, the “Fact Report” is so flawed in key respects that it cannot form the basis of an estimate of the extent of competitive local fiber deployment.

Inclusion of Long Haul Facilities. The Fact Report relies on data from the *CLEC Report 2001* prepared by the New Paradigm Resources Group (“NPRG Report”).¹⁵ However, the NPRG Report does not present a reliable estimate of local competitive fiber deployment because that report does not purport to measure *local* fiber deployment. In fact, the reported data clearly includes both long haul and local fiber in one aggregated measure for several, if not most, of the

¹³ <http://www.cnn.com/TECH/computing/9910/20/sbc.pronto.idg/index.html>

¹⁴ Fact Report at 10.

companies cited in the NPRG Report. For example, the NPRG Report states that Winstar is the largest provider of competitive fiber, with 22,000 miles of fiber deployed around the country. However, according to the company's March 10, 2000 10K report, only 6,000 miles of these facilities are local, intra-city deployments. The data for McLeodUSA also includes non-local fiber. The NPRG Report indicates that McLeod has deployed 21,622 route miles of fiber. The company itself, however, reports that only one-quarter of its total fiber deployments are for local facilities.¹⁶ In fact, a review of several other companies listed in that report suggests that the BOC's improper use of data is pervasive. For example, it is clear that the 16,000 route miles reported for Level 3, cited by NPRG as the eighth largest provider, does not include *any* local facilities.¹⁷ Similarly, NEON's network includes substantial long-haul facilities that appear to be subsumed in the total fiber mile figure reported by NPRG.¹⁸ In addition, El Paso's planned \$2.1 billion investment is predominantly for intercity fiber facilities.

Since the "Fact Report" includes long haul facilities in fiber miles reported, it does not provide an accurate assessment of local fiber facilities provided by competitive carriers that could substitute for ILEC unbundled high capacity loops and transport. Therefore, the Commission may not rely on this report as a basis for showing that CLECs do not need unbundled high capacity loops and transport.

¹⁵ Information on competitive network route mile deployments appears at chapter 7, Table 4 of the 2001 edition of the NPRG Report.

¹⁶ See <http://www.mcleodusa.com/html/ir/presentations.php3> (March 30, 2001 presentation to Morgan Stanley Global Communications Conference – slide titled "One Functional Network") (visited May 30, 2001).

¹⁷ See <http://www.level3.com/us/info/network/networkmap> (reporting that the company plans to build a 16,000 mile intercity network (corresponding to the figure reported by NPRG), adding that the Company will then "build local fiber networks in most of the markets where their services are offered." Thus, local intra-city facilities are included in the 16,000 mile figure.)

¹⁸ For Neon, see <http://www.neoninc.com/page.cfm?contentID> (stating that the "NEON network delivers connectivity to five tier-one cities and 21 second tier cities in the Northeast and Mid-Atlantic states").

Overestimation of Buildings Served By CLECs. The BOC Petition claims that CLECs serve 25 percent of all commercial office buildings.¹⁹ Even if true, of course, this means that 75% of such buildings are not served by CLECs and, therefore, CLECs would require unbundled access to ILEC loops to reach these buildings. In addition, it already has been demonstrated in this proceeding that the “Fact Report” grossly overstates the percentage of “on-net” large office buildings that CLECs serve.²⁰ The “Fact Report” derives its estimate that competitive LECs serve 175,000 office buildings nationwide by adding the number of buildings served by each LEC individually, as reported by NPRG. However, this fails to account for the fact that in many, if not most, cases, multiple competitive LECs serve the same building.²¹ Thus, the “Fact Report” erroneously assumes that each building “penetrated” by a competitive LEC is served by only that one CLEC. A more accurate estimate of the number of buildings connected to CLEC fiber from an independent analyst is 30,000 nationwide,²² a far cry from the 175,000 claimed by the BOC Petition.

Again, since the “Fact Report” overstates the reach of competitive fiber provider networks in this regard, it does not provide any basis for determining that CLECs have sufficient alternatives to ILEC unbundled high capacity loops and transport.

ILECs Do Not Permit Non-Discriminatory Access to ILEC Duct and Conduit in ILEC Central Offices. The BOC Petition contends that the economics of CLECs deploying fiber are continuing to improve in many respects in part because CLECs may obtain access to ILECs’

¹⁹ BOC Petition, p. 11.

²⁰ See Reply Comments of AT&T Corp. On Use Of Unbundled Network Elements To Provide Exchange Access Services, CC Docket No. 96-98 (April 30, 2001) at 24-26.

²¹ Id. at 24.

²² Jonathan Atkin and David Coleman, City Light: An Investor’s Guide to Metropolitan Optical Services 6 (Dain Rauscher Wessels, March 22, 2001).

poles, duct, and conduits at TELRIC-based rates.²³ As already discussed, however, the Petition fails to acknowledge that ILECs do not provide any access, let alone nondiscriminatory access, to ILEC duct and conduit in ILEC central offices. The theoretical ability of CLECs, CFPs, and other telecommunications carriers to access ILEC duct and conduit does not provide any evidence of alternatives to ILEC facilities given that ILECs are thwarting access to ILEC central offices.

Moreover, the “Fact Report” does not provide any evidence of the extent to which CLECs are accessing ILEC duct and conduit outside the central office or that it is economical for them to do so. Instead, it merely points out that technical advances are permitting more data to be pumped over fiber once it is in place.²⁴ This does not show that CLECs are able as a practical or economic matter readily to access ILEC duct and conduit either inside or outside the central office. In fact, as numerous commenters will point out, it is very expensive to install competitive loops and transport either in ILEC duct and conduit, or anywhere. Accordingly, the Commission should give no weight to the Petition’s assertions concerning access to ILEC duct and conduit.

Misplaced Reliance on Collocation As a Measure of Competitive Loops and Transport.

The BOC Petition contends essentially that since the Commission determined in the *Pricing Flexibility Order*²⁵ that the market for special access is sufficiently competitive, as measured by CLEC collocation, to permit BOC pricing flexibility in certain respects, BOCs should also be relieved from unbundling obligations for high capacity loops and transport. However, the Commission already has expressly rejected the view that its pricing flexibility triggers are

²³ Fact Report, p. 13, fn. 60.

²⁴ Id. p. 13.

equivalent to the impairment test for UNEs under Section 252(d) of the Act.²⁶ This is because collocation is not a measure of the extent to which CLECs have deployed their own competitive loops and transport. Collocation may be a suitable measure of the competitive presence of CLECs and their ability to offer competitive special access services that can justify pricing flexibility for ILEC special access service. However, CLECs usually obtain ILEC loops and transport to connect to their collocation space in order to provide special access service. Therefore, the extent of CLEC collocation is absolutely irrelevant to measuring the extent to which CLECs have available to them competitive sources of loops and transport, or the extent to which CLECs self-provision these facilities, even if collocation is related to ILEC competitive presence in a market sufficient to justify pricing flexibility. Accordingly, the Commission should reject out of hand ILEC contentions that collocation is an adequate measure of CLEC impairment with respect to high capacity loops and transport.

V. THE PETITION SHOULD BE DISMISSED BECAUSE THE COMMISSION HAS ALREADY ESTABLISHED A PROCESS FOR REVIEWING UNBUNDLING REQUIREMENTS

It is no accident that the Petition fails to address any procedural steps that the Commission should take to remove high capacity loops and transport from the national list of UNEs that ILECs must provide. Thus, the petition completely ignores the fact that the Commission in the *UNE Remand Order* established a framework for reevaluating the national list of UNEs. In the *UNE Remand Order*, the Commission determined that it would review the required list of UNEs every three years,²⁷ and explicitly considered and discarded alternative proposals that would have modified the review period to various intervals ranging from two

²⁵ See Fifth Report and Order and Further Notice of Proposed Rulemaking, Access Charge Reform, 14 FCC Rcd. 14221 (1990) ("Pricing Flexibility Order").

²⁶ UNE Remand Order, ¶¶ 344-45. See also Pricing Flexibility Order ¶¶ 94.

years to five.²⁸ The Commission found that *ad hoc* petitions targeted at individual UNEs on a piece-meal basis would undermine the goals of stability, market certainty and administrative efficiency. The BOC Petition violates this determination and, therefore, should be summarily dismissed, as some parties have already requested.²⁹

Moreover, the “Fact Report,” prepared by an attorney for USTA, is no more than a recycled version of the same showing made by USTA to the Commission 18 months ago. The Commission considered and rejected that showing in the *UNE Remand Order* as providing any basis for not designating high capacity loops and transport as UNEs. There is essentially nothing new in this report. The same sweeping allegations and superficial analysis of the extent of fiber deployment already has been found insufficient by the Commission. For example, the Commission has rejected the USTA assertion that “nearby” fiber rings is a sufficient basis for removing high capacity loops and transport from the UNE list, in light of the manifest difficulties of constructing fiber loops.³⁰ Similarly, the Commission found that USTA’s impressionistic presentation lacked the detail and granularity necessary to support the requested exclusion of high capacity loops and transport from the list of UNEs. Accordingly, in addition to the fact that the BOC Petition is contrary to the Commission’s specific three-year review period, the Commission also should dismiss the BOC Petition to conserve resources and avoid considering again the same information that was considered and rejected in the *UNE Remand Order*.

²⁷Id. at ¶ 151.

²⁸Id. at ¶¶ 150, n.266, 151, n. 269. Of course, the three year review period does not imply to any extent that any network elements should be removed at that time. The Coalition believes that unbundled access to ILEC high capacity loops and transport will be necessary well beyond the next triennial review.

²⁹ Motion to Dismiss Joint Petition, NewSouth Communications, CC Docket No. 96-98, filed April 25, 2001.

³⁰UNE Remand Order ¶ 329.

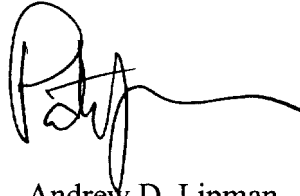
VI. CONCLUSION

For these reasons, the Commission should preferably dismiss, or alternatively deny, the BOC Petition.

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